

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 708 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No
2. To be referred to the Reporter or not? No
3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

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HARIJAN GIGA JETHA

Versus

STATE OF GUJARAT AND OTHERS

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Appearance:

MR SURESH M SHAH for Petitioner  
MR LR POOJARI ADDL.GOVERNMENT PLEADER  
for Respondent No. 1

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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 10/12/98

ORAL JUDGEMENT

This appeal is directed against the order dt.9th April, 1979 passed by the then learned Civil Judge (Senior Division) at Gondal in Misc. Civil Application No. 3 of 1973 on his file, dismissing the application filed by the present appellant under O. 21 R. 58 Civil Procedure Code. In order to appreciate rival contentions, necessary facts may in brief be stated.

2. Virabhai Manand was the contractor. He used to submit tenders as and when invited by the Government or other persons and undertake the works. Once the Government invited the tenders for Mitayana Dam works. The tender of Virabhai Manand was accepted. He and Desha Bhala jointly undertook to complete the work, but for one or another reason, they could not complete the work, as a result, the Government sustained loss. The Government, therefore, filed Special Civil Suit No. 2 of 1964 in the Court of the learned Civil Judge (Senior Division), Morvi for the recovery of Rs.56,356-15 Ps. A decree for Rs.46,227-75 Ps. came to be passed on 25/11/1966. Virabhai Manand had expired in the year 1961. Hence the suit was filed against his heirs- the present respondents. After the decree was passed, the present respondent nos. 2 to 4, on 30/11/1966, sold their house situated in station plot to the present appellant for Rs.10,000/-. The State Government -respondent no.1 after waiting for the satisfaction of the decree, filed execution petition being Special Darkhast No.1 of 1971 against the respondent nos. 2 to 4 for realisation of the amount, if necessary by auctioning out the moveable or immovable properties of Virabhai Manand. The house sold to the present appellant came to be attached in the execution petition. The appellant when knew about the same rushed to the court and filed Misc. Civil Application No.3 of 1973 in the Court of the learned Civil Judge (S.D.) at Gondal under O. 21 R. 58 Civil Procedure Code and urged the court to release the house, he had purchased from the attachment.

3. The Respondent nos. 2 to 4 appeared before the lower court and filed the written statement at Ex.14, supporting the case of the appellant and further submitting that they had sold the house attached for Rs.10,000/- executing the sale deed on 30/11/1976. After the house was sold, the appellant also constructed two more rooms. Virabhai Manand was indebted to Popatlal Raghavji, Fulbai Narbheram, Bhikhubhai Juthabhai and Nagrik Co-operative Bank Ltd. Fulbai Narbheram had filed Regular Civil Suit No.69 of 1963 to recover Rs.2,482/-. After the decree was passed, she had also filed the execution petition. For realisation of the amounts of Rs.2,093-55 Ps. Bhikhubhai Juthabhai had also filed the suit being Regular Civil Suit No. 286 of 1962 and after the decree was passed, he also filed the execution petition. Likewise, Nagrik Co-operative Bank also filed the suit being Regular Civil Suit No. 97 of 1963 and after the decree was passed, the Bank also filed Execution Petition No.114 of 1964, for realisation of the

decretal amount. Rs.1,000/- were to be paid to Popatlal Raghavji. In order to clear out such debts, they were constrained to sell the house.

4. The State Government- respondent no.1 appeared before the lower court and filed the written statement at Ex.16, contending, inter alia, that the application was not bonafide. The appellant was not the owner of the house in question. In such cases, the Government would get priority for realisation of the decretal amount. The house attached could not be released. The sale was made five days after the decree in its favour was passed. The sale was made to defraud and defeat it and delay the recovery. The Government has thus in short come out with the case that to defraud and defeat the creditors and delay the recovery, bogus sale was made etc.

5. The learned Judge below framed necessary issues at Ex.17 and recorded evidence adduced by both the parties. It may be stated that the Government has led no evidence before the lower court. Appreciating the evidence on record, the learned Judge found that the house attached was not required to be released, because the sale effected was illegal and was made to delay the recovery and defraud the creditors. He, in the result, dismissed the application. It is against that dismissal order, the present appeal is filed.

6. The only question that arises for consideration is whether the sale effected in favour of the applicant is made with the intention to defeat or defraud the creditors. To deal with the issue, Sec. 53 of the Transfer of Property Act being the relevant provision must be born in mind. In order to attract the provision of Sec.53, it should be established that debtor had the intention not only to defeat or delay the creditor claiming the auction but to defraud the creditors generally and not to prefer one creditor to another as the provision gives no right of rateable distribution. A bare intention to defeat or delay is not enough, the intention must be to impair the estate and rendering it incapable of removal for satisfying his general liabilities is necessary. To put it in different words if the instrument removes the property from the creditors to the benefit of debtor, clear intention to defraud the creditors can be spelt out so as to attract Sec.53 Transfer of Property Act. The onus to prove the intention is on the party who asserts that the sale is made to defeat or defraud the creditors. If that is established, it would be for the transferee to show, if at all it is his case, that the sale was effected in good

faith. He must show that consideration paid was not grossly inadequate and the transfer effected was not merely a cloak for retaining the benefit by the transferor.

7. Mr. Poojari, the learned AGP representing the respondent no.1- State of Gujarat contends that the sale deed produced at Ex.49 does not show the number of the property or the area of the property so as to identify the property sold. Omission to mention the number and area of the property in the sale deed would show that the sale was effected to defraud and defeat the creditors. The contention cannot find favour. Whenever question about identification of the property arises, while perusing the document because of non-mention of relevant particulars therein, the description by boundaries, if given, shall prevail in ascertaining actual property sold under the document provided the same are exact, and this is what has been made clear by the High Court of Madras in the case of Dharmukanny Nadar Siviseshamuthu and others Vs. Mahalingam Nadar Gopalakrishna Nadar and others, AIR 1963 Madras 147. On the same point, the High Court of Calcutta, in the case of M/s. Roy and Co. and another, Vs. Sm. Nani Bala Dey and others, AIR 1979 Calcutta 50 has making the law clear observed that, if there is conflict qua area and boundary, the description of the boundary will prevail. In the case of Tronglaobi Pisciculture Co-operative Society Ltd. Vs. Chief Commissioner (Administrator) of Manipur and others, AIR 1969 Manipur 84, the issue about construction of documents arose. While dealing with the same, the law that is made clear is that when the recital about extent is found incorrect, the boundaries shall prevail over the extents. As back as in 1948, when similar question arose before Privy Council in the case of The Palestine Kupat Am Bank Co-operative Society Ltd. Vs. Government of Palestine and others, AIR 1948 PC 207, it is made crystal clear that whenever there is a conflict with regards to the area and description by boundaries, the description by boundaries is to be preferred. As per such law made clear, it is to be ascertained in this case, whether the property in question is identifiable, though area or number thereof is not mentioned in the sale deed Ex.49.

8. On perusal of the document, it appears that the description is clearly given. As per the statement made in the document, the property is situated in Station Plot at Gondal. The same was purchased from Kothari Gulabchand Raychand under a document dt. 7th June, 1956 registered with Sub Registrar Office Vide Entry No. 645. The total area of the house was approximately 510 sq.yds.

and his title deed was bearing No.18419. It was the house facing north consisting of a gate towards north, two rooms facing north, the first floor and the terrace over it. Fali land (courtyard) in front of the house, there is also a room used as Punja room and description thereof is also given. What is situated at the four corners of the house, is also mentioned. Such description is sufficient to identify the property, as the same sweeps off any confusion or puzzle about the identification, of the house attached, that the house belonged to Virabhai Manand. Consequentially the contention must fail.

9. It is the next contention of Mr. Poojari, the learned AGP that the Government was having a preferential claim but when that was denied by such sale, it may be held that the sale was effected to defraud and defeat the creditors. The law being clear on the point, the contention raised has to be rejected. If one creditor is given the preference over other creditors inclusive of Government, is not ipso facto deemed to be fraudulent. It is open to the debtor to select one or more creditors over others for the purpose of satisfying his debt, and so long as he does not retain any benefit in the property, the fact that one or few creditors are selected for paying debt and other creditors are left out, will not attract Sec. 53 of the Transfer of Property Act. He may pay one creditor and leave another unpaid because, it is open to the debtor to pay his debts in any order he pleases and prefer any creditor he chooses. He may convey his property to any creditor in satisfaction of debt due to him eventhough the transfer is affected to avoid an impending execution by another creditor. In view of such law, if the respondent nos. 2 to 4 have preferred to satisfy the dues of the applicant, the Government cannot claim its right on the ground of preference or priority. However it may be stated that it is open to the Government to show that the sale effected is not bonafide on other aspect of the case.

10. It is, therefore, the contention of Mr. Poojari that in this case, all the necessary contentions to attract Sec. 53 of the Transfer of Property Act, are present because the sale is effected without any consideration and the fact about possession is also indicative of the fact that the sale deed executed is delusive and fraudulent.

11. How the consideration is paid is stated in the sale deed Ex.49. What follows from the recital in the document is that the appellant had in past paid

Rs.9,000/- for and on behalf of Virabhai Manandbhai to his creditor with regard to Mitiyana Dam work. The appellant was, therefore, demanding his dues often. The respondent nos. 2 to 4 had also to pay Rs.1,000/- to Popatlal Raghavjibhai. The said amount was paid by the appellant to Popatlal Ravjibhai. Thus in all, the respondent nos. 2 to 4 had to make the payment of Rs.10,000/- to the appellant who had spent for their father Virabhai Manandbhai. To satisfy the claim of the appellant, the house was sold for Rs.10,000/-. The account was thus settled. In fact, therefore, no cash payment was made when the sale deed was executed, but the owings were adjusted. When the appellant deposed before the lower court, he has come out with cross-cutting says. According to him, he never paid Rs.1,000/- to Popatlal Raghavjibhai and he also made no payment to any of the creditors of Virabhai Manandbhai. He has also made it clear that he never paid Rs.9,000/- for and on behalf of Virabhai Manandbhai. If at all any recital in this regard is made in the sale deed, the same was not true. He had paid Rs.10,000/- in cash in the office of the Registrar while getting the document registered and at that time, Rughnathji Ramjibhai was present. Rughnathji Ramjibhai is examined at Ex.67. According to him, he simply drafted the sale deed and committed the same to the stamp paper. In his presence, the document was also attested, but in his presence, no consideration was paid. Thus, he does not support the appellant who has come out with the cross-cutting say. Regarding possession also, the appellant has not put forth a clear case. He says that after the sale was made, he took the possession and since then, he is in physical possession of the house in question. Muljibhai Virabhai the respondent no.4 one of the sellers being the heir of deceased Virabhai Manandbhai has in his evidence (Ex.72) stated that after the sale was effected, all the heirs of Virabhai continued to be in possession as the tenants because they in turn took the house on lease executing the rent note. He also showed his willingness to produce the rent note, but till the application was disposed of by the lower court, he neither produced the rent note, nor the rent receipt. Such paradoxical enigmatic & riddling case, giving rise to an arcanum & a ploy, on record is sufficient to agree with the respondent no.1 that the sale is effected without consideration so as to defraud & defeat the creditors. By sham tenancy, the respondents nos. 2 to 4 retained the interest or benefit. The requirements to attract Sec. 53 of the Transfer of Property Act are thus satisfied. In view of the fact, it can be said that the sale of the house is made with the intention & contrivance to defraud and defeat the

creditors.

11. No doubt, the evidence on record shows that Virabhai Manandbhai was indebted to Popatlal Raghavjibhai, and Nagrik Co-operative Bank who had, as stated above, filed different suits and execution petitions but the evidence on record also shows that their dues were satisfied prior to the decree passed in favour of the respondent no.1 on 25th November, 1966. When the sale deed in question was executed on 30/11/1966, dues of the aforesaid persons were already satisfied. There is, therefore, no justification in the contention raised on behalf of the respondent nos. 2 to 4, that to satisfy the debt of the above stated two persons also, the sale was effected. On the contrary, such circumstance on record discredits the truth of the defence advanced.

12. In this case, the registered sale deed is executed and the respondent nos. 2 to 4 who are the vendors have admitted the sale of their house and receipt of consideration. It is, therefore, the contention of the appellant that the sale effected cannot be held fraudulent, or the same was executed with the intention to defraud or defeat the creditors. The contention is fallacious. Simply because the sale deed is executed and registered or recital about payment of consideration is made and vendors have also made the statement acknowledging the consideration will not establish that the sale deed is bonafide, especially when all those recitals are called in question by the otherside. In that case, the vendor or transferee has to show that everything was done in good faith or with all bonafides and there was no secret design to defraud or defeat the creditors. In view of the above discussed evidence, here the appellant has failed to establish the bonafides. The contention, therefore, must fail.

13. It may be mentioned that the value of the house in question is about Rs. 1,000,00/- and the house is sold for Rs.10,000/- only. The consideration is thus grossly inadequate and it would also show that the sale deed is executed with intent to defeat and defraud the creditors.

14. No doubt, it appears from the evidence on record that the appellant has constructed two rooms after the alleged sale, but that fact, in view of the above stated circumstances, will not outvie the fact that the sale was effected to defeat or defraud the creditors. It is not made clear who constructed the house, on whose behalf and

out of whose fund and in whose possession the same are ? Shrewdly this point is kept elusive or equivocating. Construction of two rooms is, therefore, not the circumstance on record helpful to the appellant. On no other grounds, any other submission is made.

15. In the written statement Ex.16, the Government while assailing the case, alleged that there was collusion for effecting the sale. According to Mr. Shah, the learned advocate representing the appellant, the plea about collusion cannot be construed covering the plea that the sale was effected to defraud or defeat the creditors. A specific plea ought to have been raised. In the absence of specific plea, it is not open to Govt. to assail the sale advancing the contention that it was made to defraud the creditors. I cannot give a seal of approval to the contention raised. The word "collusion" indicates mischief or a secret understanding for a fraudulent purpose or design to baffle or delude the third party's claim. Using the word "collusion", the Government raised the plea that the sale was effected to defraud and defeat the creditors. Consistent with the plea, the parties led the evidence, made necessary statements and the lower court was then called upon to give finding on that point. When accordingly knowing fully well, the parties have battled & contested, it is not open to the appellant to contend that no case challenging the sale is advanced viz. sale was effected with the intention to defraud or defeat the creditors. It seems that the appellant has acted like a drowning man catching anything available. On such reasonings also, the contention that specific issue about sale for defeating or defrauding the creditor having not been framed, the parties did not know what the case they had to meet with, cannot be accepted. Both the parties have led the evidence on the point knowing fully well that Issue No.2 was covering the question about the sale effected to defraud the creditors. It may be that the issue No.2 is not happily worded, but when neither of the parties is misled and every one knowing fully well what it covers led the evidence regarding the sale effected, the appellant cannot be allowed to lament on the ground of no issue.

16. For the aforesaid reasons, the appeal, being devoid of merits, must fail. The learned Judge below has made no mistake either of law or on fact. The order passed by the lower court is, therefore, required to be maintained. In the result, the appeal being devoid of merits is hereby dismissed with costs. Interim relief, if any, shall stand vacated.



10/12/1998. \*\*\*\*\*

(ccshah)